80-2121

Office-Supreme Court, U.S.
FILED
MAY 23 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

Edward Dean Martin,

Petitioner

v.

The State of Georgia,

Respondent

Petition For Writ of Certiorari to

The Court of Appeals For

The State of Georgia

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QUESTION PRESENTED FOR REVIEW

IS FUNDAMENTAL FAIRNESS VIOLATED WHEN A DEFENDANT IN A CRIMINAL MATTER ON TRIAL FOR HIS LIBERTY IS DENIED THE OPPORTUNITY TO HAVE AN EXPERT OF HIS CHOOSING, BOUND BY APPROPRIATE SAFEGUARDS IMPOSED BY THE COURT, EXAMINE PIECES OF CRITICAL EVIDENCE SEIZED AND HELD BY THE STATE WHOSE NATURE IS SUBJECT TO VARYING EXPERT OPINION WHEN THE STATE REFUSES TO CONDUCT COMPARISON TESTS ON THE EVIDENCE SEIZED AND HELD ? (Barnard v. Henderson, 514 Fed. Reporter, 2d Series, 287.)

PARTIES TO THE PROCEEDING

The parties to the proceeding are : Edward Dean Martin; and (2) The State of Georgia.

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OPINION BELOW

THE OPINION OF THE COURT OF APPEALS OF GEORGIA AFFIRMING THE DENIAL OF DEFENDANT'S MOTION TO TEST AND INSPECT AND THE DENIAL OF PETITIONER'S WRIT OF CERTIORARI BY THE SUPREME COURT OF GEORGIA ARE REPODUCED AS APPENDIX A AND B HERETO.

JURISDICTION

THE OPINION AND ORDER APPEALED FROM WAS FILED FEBRURARY 2, 1981. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of

the laws."

The Fifth Amendment to the Constitution of the United States provides:

> " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Miltia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

When the original trial was coming on before the court in August 1978, the petitioner filed and proceeded with a motion to be allowed to test, examine, and make comparisons on certain evidence seized by the state, to wit: sperm

samples and grease samples alleged to have been taken from the alleged victim. (R-99).

The respondent contended that such tests, examinations, and comparisons should not be allowed. The court agreed. (T-14), (T-15).

The petitioner again renewed and refiled his motion to be allowed independent tests, examination, and comparisons on April 16, 1980. (R99-102). The text of this motion disclosed:

1. that the respondent held a swab that was taken off the alleged victim and that said swab allegedly contained a sperm sample. (R-99);

2. that independent tests, examination, and comparison test of the sperm held by the respondent could exclude the petitioner as being the

person who was alleged to have had intercourse with the alleged victim at the time in question. (R-49);

3. that the respondent had refused to make the requested comparison tests and had for more than eighteen months refused to permit petitioner to examine or have independent experts examine and conduct such tests. (R-99);

4. that such tests, examinations, and comparisons could be conducted in three to four days. (R-99; and

5. that the petitioner should be allowed to conduct an independent examination and comparison tests with an expert of his

own choosing in regard to the grease smudges found on the alleged victim's clothing and vehicle. (R-100).

That on April 23, 1980 a hearing was conducted in the court below in regard to petitioner's independent examination and comparison test motion. (T-1). During the course of said hearing, the following facts were established, to wit:

1. that the respondent was holding the sperm sample taken off the alleged victim. (T-7);
2. that a comparison and examination tests of the nature sought by petitioner was scientifically recognized. (T-7);
3. that the comparison tests sought would be exculpatory of the petitioner if the results of

said tests were negative toward petitioner. (T-8);

4. That there was nothing at that point to identify the grease or the sperm sample held by the State as having come from any particular person. (T-10);

5. That the petitioner was waiving any rights that he had under the law prohibiting a forced extraction of a sperm sample from him and asking the state to make the subject test or in the alternative provide petitioner with the opportunity to have such a test conducted. (T-12);

6. That a serum analysis and comparison of the type requested could exclude the petitioner as the guilty party. (T-13); and

7. That the taking of sperm by the respondent from the alleged victim shortly after the occurrence in question was a fact of corroboration intended to be relied upon by the respondent in proving the charge of rape against petitioner. (T-16).

Upon the trial of the case at bar in the court below, Roger Parian was qualified as an expert witness by the respondent and through his testimony established the following facts, to wit:

1. that said witness did in fact find sperm on the microscope slide given to him by the G. B. I. (T-200);

2. that the above mentioned sperm sample came from the rape kit that the G. B. I. had in

fact used in its investigation of the occurrence in question. (T-197);

3. that the witness was a micro-analyst and was the director of the Savannah, Georgia Branch of the State Crime Lab. (T-206);

4. that it was possible to determine the blood type of an individual from their seminal fluid and that was why swabs were included in the standard kit used by the G. B. I. (T-206);

5. that a comparison test of the kind under discussion could eliminate a person as a defendant through the blood typing of the seminal fluid. (T-206), (T-207);

6. that there was no evidence as to who produced the subject

sperm sample. (T-211); and

7. that the subject sperm sample being held by the respondent came from the vagina of the alleged victim. (T-212).

The respondent refused to conduct any comparison tests (Identification tests) on the sperm samples or on the grease and refused to allow the petitioner to conduct such tests. The trial court agreed with the state.

REASONS FOR GRANTING WRIT

The decision below significantly undercut petitioner's Fifth Amendment right in that same deprieved petitioner of his liberty without due process of law and raises an important constitutional question, to-wit: Did the failure of the court below to permit petitioner prior to trial to have an expert of his

own choosing examine critical pieces of evidence which allegedly came from the person and clothing of petitioner so that counsel for petitioner could prepare himself to cross examine the respondent's expert and so that petitioner could exculpate himself in regard to said items violate petitioner's right to a fair trial as guaranteed by the United States Constitution?

To work effectively, it is important that society's criminal process satisfy the appearance of justice and be above reproach; also, it must be beyond the suspicion of reproach.

To satisy this requirment, the State should not refuse to permit one such as petitioner to test and examine physical items of evidence if said items are in fact what they purport to be and

the witness for the State is in fact what he purports to be and can stand behind his work and resist any contrary findings that may be found by an independent expert not on the State's pay roll. In commenting on the standard to be used in evaluating such a circumstance, the federal judiciary stated in the case of Ruiz v. Cady, 635 Fed. Reporter, 2d Series, 587, to-wit:

> "..formulating the applicable standard is not as important as recognizing that the omission must be evaluated in the context of the entire record because if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Since the respondent did in fact use the critical pieces of evidence against petitioner and did in fact produce an expert to testify that said

items were what they in fact purported to be and since petitioner's counsel was not an expert on the subject of either, it is submitted that said critical portion of the respondent's case amounted to trial by ambush and denied petitioner effective assistence of counsel at a critical stage of the proceedings. Commenting on trial by ambush, the federal judiciary stated in U.S. v. Cook, 608 F. 2d, 1175:

> " Trial by ambush may produce good ancedotes at bar conventions, but tends to be counter-productive in terms of judicial economy."

Petitioner alleged below that indepent test and examination of the sperm and grease samples held by the respondent could exclude him as the person who was alleged to have had intercourse with the alleged victim. The respondent's refusal to permit petitioner to examine

and test said items the results of which could have been material on the issues of identity and guilt constituted a supression of the evidence. In Brady v. Maryland, 373 U.S. 83, 10 LEd 215, 83 Supreme Court, 1194, and Giglio v. United States, 405 U.S. 150, 31 LED 104, 92 St. Ct., 763 this court held:

> " Suppression of evidence by the prosecution is a violation of the defendant's due process rights under the 14th Amendment of the United States Constitution....The evidence is material if it is of sufficient significance to result in the denial of the defendant's right to a fair trial."

The Supreme Court of Georgia stated in its written opinion issued in the case of Emmett v. State, 243 Ga., 554:

> " A defendant in a criminal matter had a right to have a person of his own choosing examine items of physical evidence in order to properly prepare his de-

fense."

It legally and logically follows from the ruling in the Emmett case that examination of items of physical evidence being held by the State includes testing of that evidence. Petitioner is prepared to support this premise upon brief and show by example that in many instances, such as products liability cases conducted on the civil side of the court, the manufacturer is given an opportunity to inspect and test the alleged defective items and that in bastardy proceedings blood test are a common occurrence.

It is submitted that petitioner and his counsel could look at a sperm sample all day and not know what he was looking at and by the same token look at grease smudges all day and not know that they were different unless he possessed

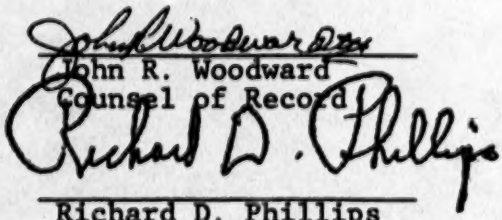
the necessary expert chemical knowledge to test same; therefore, petitioner will show upon brief, if permitted, that the failure of the respondent in situations, such as is being presented, to permit examination and testing of critical items of physical evidence creates an unacceptable gap in critical proceedings and permits the state to ambush a defendant at trial and then force a virtual default by said defendant in regard to such evidence. Additionally, the opportunity for a zealous prosecutor or state expert to stretch and magnify the importance or usefulness of such physical items upon trial necessitates the restoration of some form of checks and balances in this area of the case. In the matter at bar, if experts would have agreed, then no harm would have been done; however, if

different experts had varying opinions, then the petitioner was entitled to the benefit of that variance before an impartial jury composed of his peers.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectively prays that this Honorable Court issue a writ of certiorari to the Court of Appeals for the State of Georgia to review this cause for the reasons stated above, and that this Court reverse Petitioner's conviction.

Respectfully submitted,

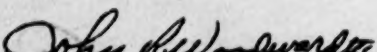


John R. Woodward
Counsel of Record

Richard D. Phillips
Counsel of Record

CERTIFICATE OF SERVICE

I, John R. Woodward, a member of the bar of this court and counsel of record for petitioner, hereby certify that on this 11th day of June, 1981, I served three copies of the foregoing "Petition for Writ of Certiorari to the Court of Appeals for the State of Georgia upon the Honorable Arthur Bolton, Attorney General, by mailing the same to him via United States mail, first class postage prepaid, from Ludowici, Georgia, addressed to him at 132 State Judicial Building, Atlanta, Georgia. 30334.



JOHN R. WOODWARD
Counsel of Record

APPENDIX A

OPINION OF ORIGINAL SUBMISSION

No. 60986

Court of Appeals for
the State of Georgia

February 2, 1981

CARLEY, Judge.

This case makes its second appearance before this court. Appellant's original conviction of aggravated assault and rape was reversed in Martin v. State, 151 Ga. App. 9 (258 SE2d 711) (1979). Upon retrial, appellant was again convicted of rape but found not guilty of aggravated assault. Appellant brings the instant appeal from his conviction of rape.

1. In his first enumeration of error appellant contends that the trial court "erred in not granting Appellant's motion to be allowed to conduct indepen-

dent tests and comparisons on the sperm samples and grease sample held by the state when the state refused to conduct said tests and comparisons." This contention has already been found to be without merit. Martin v. State, 151 Ga. App. 9, 13 (6), supra.

2. Appellant argues that the facts of this case require a finding that "the alleged offense of aggravated assault became merged and was included in the superior crime of rape," thereby necessitating a correlative finding that the state should not have been permitted to try appellant on both charges. Again, this issue has already been decided adversely to appellant. Martin v. State, 151 Ga. App. 9 (1), supra.

3. In his third and fourth enumerations of error appellant attacks

the verdict of the jury finding him guilty of rape, contending that the jury could not have properly found him guilty of rape and not guilty of aggravated assault.

The test as to whether verdicts are inconsistent has been stated as follows: " The determinative factor in such cases is whether the acquittal of one charge necessarily includes a finding against a fact that is essential to conviction for the other charge. If so, the evidence is then insufficient to support a verdict of guilty in the convicted charge." (Emphasis supplied.) Conroy v. State, 231 Ga. 472, 475 (202 SE 2d 398) (1973). Applying this standard to the facts of the case at bar, we find that the jury's verdict of guilty on the rape charge is not inconsistent

with its verdict of not guilty on the charge of aggravated assault. Even assuming that the jury found that appellant did not assault the victim with a tire jack, as had been alleged by the state, this finding in no way necessarily precluded the jury from finding each and every fact necessary to a verdict of guilty on the charge of rape. Appellant's third and fourth enumerations are consequently without merit.

4. In his final enumeration of error appellant complains that the trial court's charge on corroborating evidence as required under former Code Ann. § 26-2001 misled the jury into believing that the state was not required to prove appellant's guilt beyond a reasonable doubt. The portion of the charge to which appellant objects reads as follows:

" It is for the jury to determine whether the (testimony of the)female alleged to have been raped...has been so corroborated or not. It's not necessary that the corroborating evidence, if any, should be of itself sufficient to show the defendant guilty beyond a reasonable doubt from all of the evidence, that is of the female alleged to have been raed and the corroborating evidence, if any, all taken together." (Emphasis supplied.)

While the portion of the trial court's charge exerpted above cannot be deemed a model of clarity, we do not believe that it was so likely to confuse or mislead the jury concerning the state's burden of proof in this case that a new trial is required. Prior to the giving of the section of the charge

challenged by appellant, the jurors were fully and adequately instructed as to the "beyond a reasonable doubt" standard to be applied in the instant case in the following language:" Before you would be authorized to convict the defendant there must be other evidence independent of (the testimony of the prosecutrix) sufficient to connect the accused with the offense charged and all of the evidence taken together must convince your minds beyond a reasonable doubt of the guilt of the accused." (Emphasis supplied.) Thus, viewing the charge as a whole, we find that any error which may be ascribed to the trial court's language concerning corroborative evidence is, at most, harmless. See Bryant v. State, 229 Ga. 60 (3) (189 SE2d 435)(1972); Avery v. State,

141 Ga. App. 92 (4) (232 SE2d 618) (1977).

Judgment affirmed, Quillian, C. J. and Shulman, P. J., concur.

Decided Februrary 2, 1981-

cert. Applied For.

Rape. Long Superior Court. Before Judge Findley.

Richard D. Phillips, for Appellant.

Dupont K. Cheney, District Attorney, Kenneth R. Carswell, Assistant District Attorney, for appellee.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, March 4, 1981

Case No. 37367 Martin v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B.

WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

DEAR SIR: ATLANTA, March 24,1981

The motion for a reconsideration was denied today:

Case No. 37367. Martin v. State.

Yours Very Truly,

MRS. JOLINE B.

WILLIAMS, Clerk

80-2121

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

NO. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD DEAN MARTIN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

HARRISON KOHLER
Assistant Attorney General
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DON A. LANGHAM
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QUESTION PRESENTED

Where the State's scientific test did not link the sperm sample to Petitioner, did the trial court abuse its discretion in not having the sperm sample tested by Petitioner's expert?

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NO. _____

IN THE

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OCTOBER TERM, 1980

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v.

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On the night of April 11, 1978, Mrs. Billy Baker was driving home to Hinesville from Jesup. She had a flat tire

and Petitioner Edward Dean Martin, by his own admission, stopped and changed the tire for her. At this point, the facts according to the victim and Petitioner diverge. Mrs. Baker stated that Petitioner lured her out of her car and attacked her. She said that he then forced her back into the car and raped her.

Petitioner claimed that he changed the tire and then proceeded to go home. He denied raping Mrs. Baker or even having intercourse with her.

The victim, when she got home, informed her family that she had been raped. They then took her to the hospital where she was examined and samples taken as the instructions of a "rape kit" required. The rape kit

was sent to the State Crime Laboratory and it was determined that there were sperm in the sample taken from the victim's vagina, indicating that intercourse had occurred.

Just three weeks before trial and some four months after arrest, Petitioner filed a motion to test independently the physical evidence the State intended to introduce at trial. The motion was denied. The State never introduced the sperm test of the microanalyist into evidence because the analyst could not link the sperm to any specific individual.

At the first trial Petitioner was convicted of rape and aggravated assault, but the convictions were reversed on another ground. Martin v. State, 151 Ga. App. 9, 14-15, 258 S.E.2d 711 (1979).

However, the appellate court held that it was not error to deny the motion to test independently the sperm sample. Id. at 13-14.

Prior to the second trial, Petitioner moved to test independently the sperm sample. The motion was denied. At trial the State's evidence was that the sperm sample was evidence only that intercourse had taken place, but that there was no scientific evidence linking the sperm to Petitioner.

Petitioner was convicted of rape, and his conviction was affirmed on direct appeal. Martin v. State, 157 Ga. App. 304, ___S.E.2d ___ (1981). The Georgia Supreme Court denied a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

WHERE THE STATE'S SCIENTIFIC TEST DID NOT LINK THE SPERM SAMPLE TO PETITIONER, THE EVIDENCE WAS NOT CRITICAL AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT HAVING THE SPERM SAMPLE TESTED BY PETITIONER'S EXPERT.

In Gray v. Rowley, 604 F.2d 382 (5th Cir. 1979), cert. den., 445 U.S. 944 (1980), a case with an almost identical factual situation to Petitioner's, the Fifth Circuit Court of Appeals held that the evidence sought to be independently examined (rape victim's clothes with semenal fluid

on them) was not critical evidence because there was no evidence presented at trial linking the semenal fluid to the accused. Therefore, the failure to allow an independent test of the clothing did not violate any of the accused's due process rights. Id.

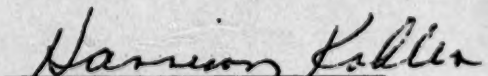
At Petitioner's trial, it was undisputed that Petitioner was at the scene of the rape. The critical testimony was whether or not the victim, who testified that Petitioner actually raped her, or Petitioner, who testified that he merely changed the tire on her car and left the scene, was credible. Obviously, the jury resolved the credibility determination in favor of the rape victim. Therefore, the rest of the sperm sample was not critical evidence, and the failure of the trial court to allow an

independent test by Petitioner's expert was not a deprivation of Petitioner's due process rights.

CONCLUSION

The petition for a writ of certiorari should be denied because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,



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ARTHUR K. BOLTON
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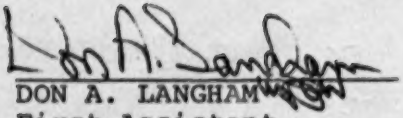

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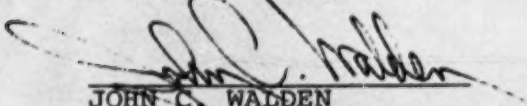

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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court, I have this day served true and correct copies of this Brief for the Respondent in Opposition upon the Petitioner, by depositing copies of this Brief in the United States mail, with adequate postage and addressed to:

Mr. John R. Woodward, Esq.
410 North Palm Street
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Mr. Richard D. Phillips, Esq.
P. O. Box 66
Ludowici, Georgia 31316

This 2nd day of July, 1981.

Harrison Kohler
HARRISON KOHLER

Office-Supreme Court, U.S.
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Edward Dean Martin,

Petitioner

v.

The State of Georgia,

Respondent

Reply Brief

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Counsel for Petitioner

COMES NOW, Edward Dean Martin, who is the petitioner in the above styled action, and files this his reply brief to respondent's brief in opposition for the respondent and respectfully shows to this honorable court the following, to-wit:

I.

FACTUAL ISSUE

A. Should petitioner have been permitted to test the subject items of physical evidence below?

II.

LEGAL ISSUE

A. What is critical evidence?

III.

LAW INVOLVED

A. "Critical evidence" is material evidence of substantial probative force that "could induce a reasonable doubt in

in the minds of enough jurors to avoid a conviction. Gray v. Rowley, 604 F. 2d. 382 (1979).

B. " No conviction shall be had for rape on the unsupported testimony of the female." Ga. Code Ann. 26-2001.

IV.

LAW APPLIED TO FACTS

In this case, petitioners entire defense was based upon the contention that no rape had occurred.

Prior to trial defendant secured from the State a list of all witnesses. The only examining physician was Dr. Victor Bautista. The microanalyst expert was Roger Paian.

Petitioner demanded a preliminary hearing on the charges of rape and aggravated assault. Petitioner subpoenaed Dr. Victor Bautista to testify at this

hearing. Under oath, at the preliminary hearing, Dr. Bautista testified that he did a general physical examination and "the only positive findings that I saw was that there was a swelling of the right index finger and she was very nervous at the time" (p. 92 preliminary hearing transcript). The doctor testified that he did not have any physical finding indicating recent intercourse, that he didn't note any physical injury to her face, that he didn't see any grease or grass on her face, that he did a careful examination and usually would have noted any such finding since he knew this would be evidence in a rape case. (P. 92-97 preliminary hearing transcript).

Upon the trial three weeks later and upon the retrial eighteen months later,

Dr. Bautista testified that he did find evidence of intercourse because there was a discharge and that discharge was, most probably, a sign of intercourse if it is positive for sperms.(T-181). (Before trial someone apparently advised the doctor of the testimony expected from the crime lab microanalyst).

The doctor further testified that if the discharge is positive for sperms, then it is a sign that it is penetration. (T-182).

The doctor also added to his testimony, contrary to his previous sworn testimony, that he actually found a discharge and that she had a bruised or hurt lip. (T-177, T-179, T-181, & T-182).

The defendant contended that whole sperm could be found 6 to 14 days after

intercourse. When defendant sought to inquire of the doctor, the respondent objected and the court directed that the doctor would have to be qualified " as to his expertise in that particular area." (T-188).

The respondent, through their expert witness, Roger Parian of the State crime lab, then testified that in his opinion intact sperm could not be located more than 14 hours after intercourse, and he further testified that he did find an intact sperm on the slide he prepared. (T-200, T-202-3).

The respondent's expert witness acknowledged that other experts may have a different opinion or may use a different techique in arriving at their opinions as to the age of an intact sperm and he was aware of the conflicting research

and publications finding intact sperm several days after an alleged incident. (T-203-4).

The petitioner was then effectively boxed in by the respondent's expert whose opinion of the age of the sperm he found was 14 hours or less because the evidence showed that the alleged victim and her husband had separated more than 14 hours before the alleged incident.

The petitioner was unable to then produce any witness to counter the respondent's evidence.

The petitioner then attempted to counter this evidence by asking that a comparison be made between the alleged sperm (serum) held by the respondent and his serum since such tests are scientifically recognized and could exclude him as

the person who deposited the sperm. (T-206-207).

In this case where the alleged victim changed her testimony under oath on many material points, where the doctor directly reversed his opinion on the crucial testimony as to whether or not a rape had ever occurred, where the state's expert sets up his own time frame contrary to known research, where there was no evidence of fibers between the clothes of the victim and the defendant, where there was no hairs of the petitioner exchanged with the alleged victim, where the testimony is one on one victim v. defendant and where the jury chose to disbelieve the victim on the charge of aggravated assault arising at the same time and found defendant not guilty on the aggravated assault charge, can anyone imagine more

critical evidence " than 14 hours old sperm".

Could anyone imagine evidence more critical than being able to prove by another expert a longer time frame if justified by the condition of the sperm found.

Could anyone imagine more critical evidence than being able to prove by expert testimony that the sperm relied upon was excluded as defendant's serum or sperm.

The evidence clearly shows that opinions, methods, and technique of experts may vary. (T-203-205).

The grease was treated in the same way.

In his concluding argument to the jury the respondent below argued in part as follows, to-wit:

" First of all is rape and there is certain things that the state must prove as to the rape. First of there must be carnal knowledge, that's intercourse penetration. The evidence is clear there has been intercourse because intact sperm were found in the vagina of the victim which indicated there was sexual intercourse and there was penetration ." (T-346).

" Grease. No grease. No grease? You look at these and tell me there's no grease. There's dirt and grease all over these. That's grease. That's dirt. She didn't get that from dancing. She got that from what happened to her out there at the scene. There's your evidence of dirt and grease." (T-350).

" The presence of sperm proved intercourse is corroboration under Georgia law and that's been shown and that's corroboration." (T-352).

" One intact sperm is found on the slides, they test no further because they have found intercourse and thats the object of the test." (T-354).

In this case we have the respondent holding all of the alleged evidence from the victim and the crime scene.

The evidence is certaintly critical and is subject to varying expert opinions.

Most important the respondent not only refuses to allow petitioner to test, they themselves refuse to compare the grease and sperm or serum by their own experts.

It is submitted that the aforesaid law when combined with the testimony of experts and the concluding remarks of re-

spondent below show conclusively that the trial below amounted to much more than a credibility test between the alleged victim and petitioner as respondent would have this court believe. In fact, as will be shown upon brief, if permitted, respondent's presentation of the necessary corroborative evidence to obtain a conviction below rested entirely upon the identical items of physical evidence that petitioner sought to examine, verify, and test below.

The defendant's basic Constitutional rights to a fair trial, due process, and equal protection, have been grossly violated and if relief is not granted, this defendant, and countless others, will spend the balance of their lifetimes in confinement because of the right of the

respondent to withold critical evidence.

V.

CONCLUSION

Under the circumstances of the matter at bar, the subject physical items that petitioner sought to examine, verify, and test below did in fact constitute critical evidence.

WHEREFORE, PREMISES CONSIDERED, Petitioner again respectively prays that this honorable court issue a writ of certiorari to the court of appeals for the State of Georgia to review this cause for the reasons stated above, and that this court reverse petitioner's conviction.

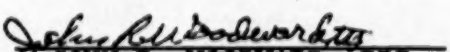
Respectively submitted,

John R. Woodward, III.
Counsel of Record

Richard D. Phillips
Counsel of Record

CERTIFICATE OF SERVICE

I John R. Woodward, a member of the bar of this court and counsel of record for petitioner, hereby certify that on this the 31st day of July, 1981, I served three copies of the foregoing Reply Brief upon the Honorable Michael Bowers, Attorney General, by mailing the same to him via United States mail, first class postage prepaid, form Ludowici, Georgia, addressed to him at 132 State Judicial Building, Atlanta, Georgia. 30334.



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No. 80-2121

In The

Supreme Court of The United States

October Term, 1980

Edward Dean Martin,

Petitioner

v.

The State of Georgia,

Respondent

AMENDENT TO REPLY BRIEF

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COMES NOW, Edward Dean Martin, who is the petitioner in the above captioned matter, and files this his amendment to his reply brief and respectfully shows to this honorable court the following, to-wit:

I.

FACTUAL ISSUE

A. Since the filing of petitioner's petition for writ of certiorari, has the Supreme Court of Georgia ruled that a criminal defendant on trial for his liberty in a non-narcotic case is entitled on motion timely made to have an expert of his own choosing bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion?

II.

LEGAL ISSUE

A. On June 30, 1981, was the law in Georgia broadened to state that a criminal defendant on trial for his liberty in a non-narcotic case was entitled on motion timely made to have an expert of his own choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion?

III.

LAW INVOLVED

" We now hold that the due process requirments of Patterson and Barnard are not limited to narcotics cases. A criminal defendant on trial for his liberty is entitled on motion timely

made to have an expert of his own choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." JAMES RUSSELL SABEL V. STATE, NO. 37184, decided in the Supreme Court of Georgia on 6-30-81.

IV.

LAW APPLIED TO FACTS

In his original petition for writ of certiorari to the court of appeals for the State of Georgia petitioner has shown that he was entitled on motion timely made to have an expert of his own choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature was subject to varying expert opinion. In his reply brief filed in response to

the States brief in opposition for the respondant, petitioner has shown that the evidence sought for independent examination and testing constituted critical evidence in view of the facts and circumstances of the matter at bar.

In view of the Sabel v. State case, supra, it logically and legally follows that the matter at bar should be referred back to the Court of Appeals of Georgia for further consideration so that a determination can be made in light of the above as to whether or not the petitioner is entitled to a new trial after an expert of his own choosing has had an opportunity to examine the subject items of physical evidence.

V.

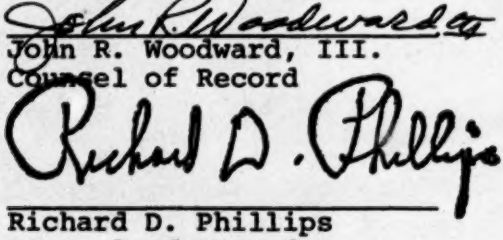
CONCLUSION

The Supreme Court of Georgia has now ruled that a criminal defendant on trial for his liberty in a non-narcotic matter is now entitled on motion timely made to have an expert of his own choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion.

WHEREFORE, PREMISES CONSIDERED, petitioner respectively prays again that this honoralbe court issue a writ of certiorari to the Court of Appeals for the State of Georgia to review this cause for the reasons stated above, and that this court either remand petitioner's cause for further

consideration by the Court of Appeals for the State of Georgia.

Respectively submitted,



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Counsel of Record

Richard D. Phillips
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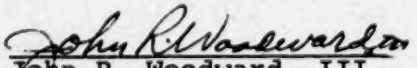
CERTIFICATE OF SERVICE

I, John R. Woodward, III., a member of the bar of this court and counsel of record for petitioner, hereby certify that on this 9th day of September, I served three copies of petitioner's amendment to reply brief upon the Honorable Michael Bowers, Attorney General, by mailing the same to him via United States mail, first class postage prepaid, from Ludowici, Georgia, addressed to him at 132 State Judicial Building, Atlanta, Georgia. 30334.



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